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VOL. 27 AUGUST, 1952 No. 11

The 1952 State Bar Convention

Stevens Fargo

MANY of us find enormous benefit and a lot of fun in the conventions of the California State Bar. It is my hope that the 1952 convention will be enjoyed by a far greater proportion of Los Angeles lawyers than ever before have participated in the conventions.

Because of the enormous increase in attendance at these conventions, it seems that they must be held in cities large enough to afford housing facilities. In the last few years Los Angeles has had the conventions alternately with San Francisco. It is the privilege of our association as the largest association in the southern part of the state to play host to our visiting lawyers in partial repayment for the excellent entertainment we have had in their own home cities.

Groups of our members, particularly our delegates to the State Bar Conference, under the chairmanship of Paul Moody, have been active since last Fall in preparation for these proceedings. Loyd Wright, Jr., heads the entertainment committee which will ably discharge our duties in this regard. His committee has worked up gatherings for the conference of delegates and young lawyers, an excellent fashion show for the ladies, seating arrangements at a performance of South Pacific and an outstanding banquet.

May I urge that you participate in the convention throughout the week of August 25th by personally attending as many sessions as you can manage and by taking part in the entertainment provided. I will address a personal appeal to you for a cash contribution to cover the enertainment costs which I know will be generously met.

STEVENS FARGO.

Taxation Reminder

By the Committee on Taxation of the Los Angeles Bar.
(This is another in the series of brief statements intended as tax refresher notes for the assistance of lawyers in general practice.)

TAX NOTE ON FAMILY PARTNERSHIPS.—The family partnership is a form of doing business wherein, as the name implies, two or more members of the same family go into partnership together. In the usual case which has received the attention of the courts, some of the partners dominate the enterprise, and the others are brought in to share profits, often as limited partners. The tax advantage of the arrangement stems, obviously, from the fact that the partnership income can be split among several taxpayers rather than being concentrated in the tax return of only one.

In times of high tax rates, such as during the war years, family partnerships were formed in great numbers. As might be expected, the Treasury Department did its best to destroy their tax advantage, and the result was rather profuse litigation.

To stem the tide of cases, Congress passed Section 340 of the Revenue Act of 1951. Since many of the family partnerships which had encountered tax difficulty had been attacked partly because the inactive family members had received their partnership interests by way of *gift* from the breadwinner, or at least without an adequate contribution of their *own* funds, it was the intent of Congress to put an end at least to this phase of the taxpayer-Treasury Department controversy. Accordingly, the 1951 Act amended Internal Revenue Code Section 3797 to provide expressly that it is immaterial whether or not the interest of the inactive family partner "was derived by purchase or gift from any other person."

The 1951 Act imposes, however, some restrictions on any unlimited ability of a breadwinner to effect a splitting of income through a family partnership:

(1) The Act specifically requires that the inactive partners must own a "capital interest" in the partnership, thus eliminating the possibility of a mere profit-sharing arrangement.

(2) The Act requires that capital be a "material income-producing factor" to the partnership. There is no statutory assistance provided as to the meaning of the latter term, nor have any Regulations yet been promulgated to furnish help as to its

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Natural Law Has Been Secularized By Many Legal Writers

By the Very Reverend Kenneth R. O'Brien and Daniel E. O'Brien*

Rev. Kenneth R. O'Brien

Daniel E. O'Brien

DURING the last decade several articles have appeared in the LOS ANGELES BAR BULLETIN[1] and in the American Bar Association Journal[2] which, while differing sharply as to the influence of Natural Law as the "higher law" of American Common Law, uniformly treat the concept of Natural Law as predominantly, if not exclusively, secular in nature.

In this article it is proposed to examine the historical development of Natural Law, emphasizing properly the theological constituent of the concept, and then to consider specifically the various ideas expressed in the articles which have been published in the BAR BULLETIN.

CONFLICTING CONCEPTS OF NATURAL LAW.

Eighteenth-Century Systems—Pagan.

The term, Natural Law, in its eighteenth-century significance, is a will o' the wisp. As an *ignus fatuus* it has led some jurists and many philosophers and legal writers down false roads in the field of American secular jurisprudence. The eighteenth-century systems of Natural Law differ in *kind* from the Natural Law philosophy of Thomas Aquinas. The eighteenth-century systems of Natural Law were not systems of law, as the term "law" is generally understood in American jurisprudence. The philosophers of these schools seemingly take the position that their systems are useful in determining what the Law of the State on *temporal* matters *ought to be*,—not for the purpose of finding out what the Law of the State *is*.

*The Very Reverend Kenneth R. O'Brien holds the degree of Doctor of Canon Law from the Catholic University of America, Washington, D. C., and is attached to the Tribunal of the Archdiocese of Los Angeles. Daniel E. O'Brien, Reverend O'Brien's father, is a retired member of the Los Angeles Bar.

[1]Nossaman, *Of Natural Law*, 24 L. A. BAR BULLETIN 33 (1948); *Ibid.*, 24 L. A BAR BULLETIN 65 (1948); Ford, *A Note on Natural Law*, 24 L. A. BAR BULLETIN 165 (1949); Gardner, *Natural Law and American Constitutional Law*, 27 L. A. BAR BULLETIN 149 (1951).

[2]See, among others, articles by McKinnon: 33 A. B. A. J. 106 (1947); 33 A. B. A. J. 544 (1947); 33 A. B. A. J. 887 (1947); 33 A. B. A. J. 890 (1947); 36 A. B. A. J. 930 (1950).

The Scholastic System—Christian.

On the other hand, Natural Law *philosophy,* as developed by Thomas Aquinas, was primarily an instrument to determine what the Law of God on *spiritual* matters *is,*—in the event of no Divine Revelation on the subject, and—in the event of Divine Revelation, to prove by human reason the truth of that Divine Revelation. Scholastic philosophy is never employed to determine what the Law of God *ought to be.*

Systems of Law—Christian Era.

Beginning with the Christian Era we had, generally speaking, three systems of law, the Law of God, the Law of the Church, and the Law of the State. The primary constituent of the concept LAW, in each of these systems, is the *Will of the Sovereign.* In the Law of God the sovereign is God.[3] In the Law of the Church the sovereign is the Church, the religiously organized society. In the Law of the State the sovereign is the State, the politically organized society.

HISTORY OF NATURAL LAW CONCEPTS.

Origin of Natural Law in Greece.

The concept NATURAL LAW had its origin in Greece as a pagan *philosophy.* It was not then a system of law, as law, in the modern sense, is understood. In Natural Law, as philosophy, there was no sovereign will, neither God, nor Church, nor State. The pagan Greek philosophers speculated neither as to the Law of God nor as to the Law of the Church. They speculated toward a reasoned understanding of social control, turning to the phenomena of nature for analogies and ideals. They were secular legal philosophers speculating as to what the City-State of their times *ought to be* in order to attain an ideal social control.

Influence of Thomas Aquinas.

During the Middle Ages Natural Law was transformed by Saint Thomas Aquinas. He was born in the Kingdom of Naples about 1225. He became a philosopher, theologian and doctor of the Church after being ordained a priest of the order of St. Dominic. Catholic writers state that the work of his life may be

[3] *Cf. Introduction* by Rev. John J. Cavanaugh, President of University of Notre Dame, to University of Notre Dame Law Institute Proceedings, 1947, Vol. I: "The natural law . . . is not a product of men's minds; it is a product of God's will."

Cf. statement by J. Francis A. McIntyre, Archbishop of Los Angeles: ". . . natural law . . . (is) a rule of action, mandatory in form, established and promulgated by the Author of nature and imposed upon all men through their very nature. It is man's participation in the law of God." Los Angeles Times, December 16, 1951. (It is submitted that the Archbishop of Los Angeles has correctly emphasized the major phase of Natural Law, as *law,* over its minor phase, as *philosophy.*)

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Excess Profits Tax Relief — Sec. 456

Howard M. Langworthy*

SINCE the enactment of the Excess Profits Tax Act of 1950, the attorney who seeks to give sound tax advice to his corporate clients must first thread his way through a maze of intricate and often-times seemingly contradictory code sections and regulations. Too often the pressure of his daily tasks causes him to overlook the benefits of the relief sections provided for by the Act.

One of the relief sections sometimes overlooked is the one dealing with abnormalities in income in the taxable year.[1] Relief provided for by the code exempts from excess profits tax items of abnormal income of the taxable year which are attributable to other years. Such income is includible in the excess profits net income of the years to which it is attributable and to the extent such income is attributable to a non-excess profits tax year, *i. e.*, 1946 through 1949, it is exempted entirely from the excess profits tax. It should be noted that this section applies whether the taxpayer computes its excess profits credit under either the income method[2] or the invested capital method.[3]

A similar provision existed in Section 721 of the World War II excess profits tax, but with one important exception. No relief is given by Section 456 where income arises out of research and development of tangible property which extends over a period of twelve months.

There are three steps essential in establishing the right to relief under this section: first, a showing of abnormal income in the current taxable year; second, a showing of the net abnormal income derived therefrom; and third, a showing of net abnormal income attributable to other taxable years.

GROSS ABNORMAL INCOME

Abnormal income is defined by the code as income of a type which the taxpayer received in the taxable year that (1) he does not normally receive or that (2) he normally receives but the amount received is abnormal.[4] Courts have experienced little

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[1] I. R. C., Sec. 456.
[2] I. R. C., Sec. 435.
[3] I. R. C., Sec. 436.
[4] I. R. C., Sec. 456(a)(1).

difficulty in classifying the income as abnormal in the first category.[5] The vast majority of the situations arise, however, where the taxpayer has received income in an abnormal amount during prior years. Such income is considered to be abnormal in amount only if it exceeds 115% of the average of the same class of income for the preceding four taxable years,[6] or if the taxpayer has not been in business for the previous four taxable years, the previous taxable years it was in existence are used.[7] A further reduction is made of an allocable part of any costs or deductions relating to such abnormal income.[8]

Even though income may be abnormal in amount it must be of a kind provided for by the code before any relief will be granted. The task facing the attorney is to properly classify gross abnormal income. Four classifications are specified by the code and provision is made for a further classification subject to regulations prescribed by the Treasury.[9] These regulations provide that further classifications of income may be made with the approval of the Commissioner as are appropriate in the light of the taxpayer's business experience and accounting practice.[10] The approach by the courts to the question has been broad.[11] Mr. Paul E. Treusch, in his article *Case Law Under Section 721*[12] points out that the great majority of cases under the prior law claimed classification under the enumerated statutory clauses of income but goes on to say that the courts early recognized the right to classify income under other than these clauses.[13]

It should be noted, however, that the regulations require classifications for any year to be consistent with classifications made under Section 456 for previous years and further require that the taxpayer is to elect irrevocably into which of the several classes income is to fall.[14]

Taxpayers claiming benefits under this relief section must file with their returns a detailed statement, in duplicate, containing information as to (1) the amount and description of each class of income claimed to be abnormal and the description of each item

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[5]Premier Products Co., 2 T. C. 445 (1943), and Ripey Bros. Distillers, Inc., 11 T. C. 326 (1948).
[6]I. R. C., Sec. 456(a)(3).
[7]Reg. 130, Sec. 40.456-1.
[8]I. R. C., Sec. 456(a)(3).
[9]I. R. C., Sec. 456(a)(2) (A through D).
[10]Reg. 130, Sec. 40.456-2(b).
[11]Geyer, Cornell & Newell, Inc., 6 T. C. 96 (1946).
[12]29 Taxes 267.
[13]Davis & Son, Inc., 5 T. C. 1195 (1946), and Knight Machinery Co., 5 T. C. 519 (1946).
[14]Reg. 130, Sec. 40.456-3(d).

in the class; (2) the amount and description of each item of income of the same class derived during the four taxable years immediately preceding the taxable year, and the aggregate of such items for the preceding years; (3) the amount of net abnormal income of each item of net abnormal income, and the computation by which these amounts were determined; (4) the transactions in which each such item had its origin, the method used in allocating such item, the amount allocated to each year, and the reasons therefor; and (5) all other facts upon which the taxpayer relies.[15] However, failure by the taxpayer to comply with these requirements was not fatal to his right to relief under the regulations (which were identical with the present regulations) under Section 721 of the World War II Act. The court in *McClelland, Inc.*[16] held that "being a relief provision Section 721 is to be sympathetically applied . . . and we shall consider the claims in issue here on its merits . . ." In this decision the court was relying on the *Soabar* case[17] in which the Tax Court recognized for the first time the taxpayer's right to apply for relief under Section 721. Presumably the courts would rely upon the same reasoning and not deny relief under the present code section.

WHAT IS PROPER CLASSIFICATION?

As we have said before the courts have in the past taken a broad approach toward classification of abnormal income items.[18] This does not mean that the attorney can make a haphazard grouping of abnormal income based on a whim of the moment. He must keep in mind that the regulations do furnish him with a starting point, and that whenever he can fit items of abnormal income into the classes specified in the regulations he should do so. In this way much litigation may be avoided.

Most attorneys will find little difficulty in classifying items of abnormal income that arise out of a claim, award, judgment, or decree, or interest thereon, which is the first class specified by the code.[19] But some of other classes such as exploration, discovery, or prospecting, sales of patents, formulae, or processes;

[15] *Ibid.*
[16] 14 T. C. 45 (1950).
[17] Soabar Co., 7 T. C. 89 (1946).
[18] See footnote 11.
[19] I. R. C., Sec. 456(a)(2)(A).

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Silver Memories

Compiled from the World Almanac and the L. A. Daily Journal of July and August, 1927, by A. Stevens Halsted, Jr.

A. Stevens Halsted, Jr.

GOVERNOR YOUNG has announced his candidates for the ten Superior Court and two Municipal Court judgeships created by the last legislature. Out of 160 names under consideration, the following have been selected for the Superior Court: **Leon R. Yankwich, Joseph P. Sproul, Charles C. Montgomery, B. Rey Schauer, William T. Aggeler, Daniel Beecher, Walter J. Desmond, Charles W. Fricke, Thomas C. Gould** and **Clair S. Tappaan.** The two appointed to the Municipal Court are **Charles L. Bogue** and **George W. McDill.**

* * *

Judge **B. Rey Schauer** is not only the youngest jurist on the Los Angeles Superior bench but he is also the first graduate of Southwestern University Law School to attain that honor. Judge Schauer attended U. S. C. as an undergraduate.

* * *

At Rushmore, South Dakota, President Coolidge dedicated a memorial to Presidents Washington, Jefferson, Lincoln and Roosevelt. Their figures are to appear in stone on the granite face of the mountain.

* * *

"I do not choose to run for President in 1928" said President Coolidge in a written statement handed to newspaper correspondents at Rapid City, South Dakota. The President's recent use of the humble worm in catching trout in the South Dakota Black Hills temporarily has disrupted the Izaak Walton League of New York.

All requests and petitions to Federal and Massachusetts State judges and to Governor Fuller having failed, **Nicola Sacco** and **Bartolomeo Vanzetti** were electrocuted. Mass demonstrations were held for them and against the courts, judges, the prosecuting officers and the Governor in almost every large city in the United States and abroad. Protest strikes were held in Paraguay, Sweden, Australia, Brazil, France, Spain, and other countries. At Geneva a mob smashed the windows of the League of Nations Palace, in London a crowd marched to the Royal Palace, and in Russia authorities organized mass meetings in all industrial centers. Sacco was an anarchist shoe worker, and Vanzetti a fish peddler. They were convicted in 1921 of murder and robbery at South Braintree, Massachusetts, when two men were shot to death. Sacco's last words at the death chair were "Long live anarchy! Farewell mother." Sacco and Vanzetti denied their guilt to the end.

* * *

At the meeting next month of the California Bar Association at Coronado, **Carl I. Wheat,** attorney for the Railroad Commission, will discuss "Some Pitfalls of the Practice Before the Railroad Commission." Committee reports will be rendered by **Alfred Bartlett** and **James S. Bennett** of Los Angeles. **Mark Slosson** will speak on "Practice and Procedure in the Corporation Commissioner's Office." The annual address will be delivered by **Silas H. Strawn** of Chicago, who was the representative of the United States in the commission appointed by the world powers to make a report on Chinese courts.

* * *

A Chancery Club luncheon in honor of Dean Roscoe Pound of the Harvard Law School was recently held at the University Club. Among those present were Justice **Conrey** of the Appellate Court, Superior Court Judge **Burnell** and Municipal Judge **Pope. Lawrence B. Martin** is president of the Chancery Club, an organization composed of prominent young attorneys and jurists. Other officers are **Carl M. Yokum,** vice-president, **Allen Cleveland,** secretary, and **Fletcher Quillian,** treasurer. Dean Pound is at present delivering a series of addresses at the Institute of Public Affairs at the University of California in Los Angeles.

At Shanghai Gen. Chiang Kai-shek resigned as Commander in Chief of the Nanking revolutionary armies and from all other posts in the Kuomintang or Nationalist political party.

* * *

The constitutionality of Nevada's new three-months residence divorce law is under fire. The old law, which required six-month's residence, was part of the state's original constitution. The new act was passed by the last legislature and is being questioned in a case in which District Judge **George L. Ballard** refused to permit the trial of a divorce suit to proceed where evidence revealed that the plaintiff had not been a resident of Nevada for six months as required by the old law.

* * *

The Federal Treasury surplus for the current fiscal year will be more than a half billion dollars, Secretary of the Treasury **Mellon** estimates. This enormous surplus is accounted for in part by heavy payment of income taxes on March 15th, estimated to have been $580,000,000. Income tax payments demonstrate conclusively to Treasury officials the enormous revenue producing power of the present income tax law.

* * *

Upon assuming charge of the Grand Jury as presiding judge of the criminal department, Judge **Albert Lee Stephens** was presented with a desk fountain pen set and a memorial by the jurors, court officers and the Deputy District Attorneys and public defenders attached to his department.

* * *

Coming as an aftermath of the recent decision of the State Supreme Court that the law imposing license taxes on foreign corporations is illegal, 340 foreign corporations which paid $93,000 under protest have demanded the return of the levies from Secretary of State **Frank C. Jordan.** Suit to recover the taxes will probably be instituted if demand is refused. The money was paid by the corporations as license taxes for 1926 and 1927, the tax subsequently being held unconstitutional because it was an assessment levied against property located outside the State and because it tended to interfere with interstate commerce.

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Note on Conflicting Settings in Federal and State Courts

Many attorneys have found that both the Federal and State courts, in setting cases for trial, have frequently refused to consider the fact that the same counsel is engaged in a case pending in the other forum which has previously been set for trial. These attorneys have therefore been confronted with the fact that they are engaged in cases pending in both the Federal and State courts, both set for trial on the same day and at the same time, and all of this through no fault of the attorneys.

This has been a troublesome problem to many lawyers practicing in both courts and the question whether the Federal court should consider the prior setting in the State court case in which counsel is engaged, and vice versa, was explored by the 1951 Los Angeles Bar Association Committee on Federal Rules and Practice. No definite action was taken by the Committee but it recommended to the Board of Trustees of the Association that the 1952 Committee consider the problem. The 1952 Committee has obtained the permission of the Board of Trustees to publish in the *Los Angeles Daily Journal* and the LOS ANGELES BAR BULLETIN a request that lawyers interested in the problem express their views on the subject in writing to the Committee.

The Committee therefore requests that interested members advise the Committee in writing whether, in their opinion, the Federal and State courts should, in setting cases for trial, give consideration to cases already set for trial in the other forum in which the same counsel appears.

These communications should be addressed to Eugene M. Elson, Chairman, Committee on Federal Rules and Practice of the Los Angeles Bar Association, 541 South Spring Street, 711 Spring Arcade Building, Los Angeles 13, California.

BROTHERS - IN - LAW

George Harnagel, Jr., Associate Editor

George Harnagel, Jr.

DURING the past year the **New Jersey** Bar Association and the **Essex County (Newark)** Bar Association sponsored a series of lectures on "The National Economy in Time of Crisis; Its Meaning to Lawyers and Their Clients." The cost of the lectures, which was substantial, was underwritten by the National State Bank of Newark.

* * *

Where pinning is sinning . . . According to law students writing in *The Daily Nebraskan,* University of **Nebraska** student newspaper, a co-ed who wears a fraternity pin is guilty of a misdemeanor. They cite a 1905 Nebraska law still on the books which says:

> "Whoever wilfully wears or uses the badge, insignia, jewel or badge of recognition . . . of any society, lodge, guild or association, fraternal or otherwise, who is not a member in good standing . . . shall be fined . . . not to exceed $50 or be imprisoned in the county jail . . . not to exceed 90 days . . ."

* * *

"Your Courts in Action" is the name given to a series of six TV shows sponsored jointly by the **Detroit** Bar Association and station WWJ-TV. They are designed "to acquaint the public with various types of court trials and give an accurate presentation of courtroom procedures and techniques."

* * *

The **Erie County (Ohio)** Bar & Law Library Association has passed a resolution denying membership to any individual who is a member of the Communist Party in the United States or who advocates Marxism-Leninism.

* * *

"Differ as we may among ourselves as to what constitutes a proper public relations program for our profession, we can all agree that our relations with the public need to be improved and that a sound program of education of the public respecting the intrinsic value of the profession to society is decidedly indicated."—Ben C. Boer, President of the **Ohio** Bar Association.

Judge Harold R. Medina and Howard L. Barkdull, President of the American Bar Association, have been elected as honorary members of the **Pennsylvania** Bar Association. . . . The Section on Labor and Industry of that Association has established a prize for the senior in the law schools of Pennsylvania who writes the best article on an assigned subject in the labor law field.

* * *

The **Philadelphia** Bar Association, which is this year celebrating its 150th birthday, claims to be the oldest bar association in the world. Are there any other contenders for this distinction? . . . Incidentally, George Wharton Pepper, in an address at the Association's 150th Anniversary Dinner, ascribed the origin of the adage "smart as a Philadelphia lawyer" to Alexander Hamilton's successful defense of John Peter Zenger, the publisher of a New York newspaper, who had been indicted for publishing a criminal libel against the British Government and the Government of New York.

The **Dayton** Bar Association recently began the operation of a lawyers' reference service and now has over a hundred attorneys participating in the plan.

* * *

Twice each week short articles on legal subjects of general interest to the public are carried on the editorial page of the *Spokane Chronicle*. They are prepared by members of the *Spokane* Bar Association as part of its public relations program. Recent titles have included: "A Dog's One Bite," "Don't Ignore a Summons," "Why a Will" and "Copyrights Explained." The success of this project has inspired the Public Service Committee of the **Washington** State Bar Association to undertake a similar program on a state-wide basis.

* * *

The following letter to the editor recently appeared in *The Advocate*, publication of the Vancouver, B. C., Bar Association:

> "I am a farmer myself, and not a lawyer, but study law as a hobby. It is a very simple subject until made complicated by lawyers and policemen."

* * *

The Supreme Court of **Oregon** has conducted an extended investigation of complaints, criticism and rumor regarding the work of the state's Board of Bar Examiners. Its report, which completely vindicates the Board, is an interesting document and an encouraging one to all those who are seeking to establish or maintain high standards for admission to the bar.

* * *

Incredible as it may seem to the California practitioner, the lawyers of **Illinois** are vigorously debating a proposal which would require a copy of the complaint to be delivered to a defendant in state court action when the summons is served on him.

* * *

"Ours is a learned profession with a tradition of devotion to the service of the Public rather than one primarily interested in its own advancement. Fulfillment of this obligation by the individual lawyer has become increasingly difficult with the years, particularly in metropolitan areas such as that in which we practice. Only by cooperative action, made possible through the organized Bar, may it be effectively accomplished."—Robert E. McKean, President, **Detroit** Bar Association.

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Opinion of Committee on Legal Ethics, Los Angeles Bar Association

OPINION NO. 192

(May 14, 1952)

CONFIDENTIAL INFORMATION—EMPLOYMENT ADVERSE TO FORMER CLIENT—CONFLICTING INTERESTS.

AN ATTORNEY SHOULD NOT REPRESENT A WIFE IN AN ACTION FOR DIVORCE WHERE THE ATTORNEY HAD FORMERLY REPRESENTED THE HUSBAND OVER A LONG PERIOD OF TIME AND HAD BECOME WELL ACQUAINTED WITH THE HUSBAND'S FINANCIAL AND PERSONAL AFFAIRS.

The question submitted for opinion is as follows:

> "Is it ethical for an attorney to represent the wife in an action for divorce against the husband where he has represented the husband for a period of some twenty years and during that period had become well acquainted with him, both through the attorney-client relationship and through a social relationship?"

Rule 5 of the Rules of Professional Conduct established for the State Bar reads:

> "Rule 5. A member of the State Bar shall not accept employment adverse to a client or former client, without the consent of the client or former client, relating to a matter in reference to which he has obtained confidential information by reason of or in the course of his employment by such client or former client."

In similar vein are portions of Canons 6 and 37 of the American Bar Association Canons of Professional Ethics:

> ". . .
>
> The obligation to represent the client with individual fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."—*Canon* 6.
>
> "It is the duty of a lawyer to preserve his clients' confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information. . . ."—*Canon* 37.

It is assumed that the attorney is not now retained by the husband and that the divorce action is a genuine contest.

It will be observed that the language of the Rule and the Canons does not forbid a lawyer's accepting employment adverse to a former client in *every* instance; the emphasis is upon use or disclosure of confidential information. See opinions of this Committee numbered 27 (January 20, 1925), 141 (May 14, 1943), 159 (December 17, 1945), and 170 (November 22, 1949). So, the question here under consideration might, theoretically, be answered by saying that the attorney could accept the employment if he did not use or disclose any confidential information.

However, we are dealing with a divorce case. In the absence of a more particularized statement of facts, we must assume that it may involve a property settlement or alimony or custody and support of children or all of those matters. It seems highly probable that the attorney has information, obtained by reason of or in the course of his former employment by the husband, which may be pertinent to some phase of the case. How can he ignore it? Moreover, ". . . If the profession is to occupy that position in public esteem which will enable it to be of the greatest usefulness, it must avoid not only all evil but must likewise avoid the appearance of evil." (Amer. Bar Ass'n Op. No. 49, December 12, 1931.)

It is our opinion that the attorney should not accept the employment.

This opinion, like all opinions of this Committee, is advisory only (By-Laws, Article VIII, Section 3).

NATURAL LAW HAS BEEN SECULARIZED

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summed up in two propositions; he established the true relations between faith and reason; and, he systematized theology. His Summa Theologica has been declared to be a complete, scientifically arranged exposition of theology, and at the same time a summary of Christian philosophy. In his introductory question, "On Sacred Doctrine," Aquinas proceeds to establish the proposition that the knowledge which reason alone affords is inadequate for man's needs, and that reason must be implemented by Divine Revelation, first because without Divine Revelation men could not know the supernatural end to which they must tend by their voluntary acts; and secondly, because, without Revelation, even the truths concerning God which could be proved by reason would be known "only by a few, after a long time, and with the admixture of many errors." Aquinas writes that when revealed truths have been accepted, the mind of man proceeds to explain them and to draw conclusions from them. Hence results theology which is a science, because it proceeds from principles that are certain. The object or subject of this science is God; other things are treated in it only in so far as they relate to God. Reason is used in theology not to prove the truths of faith, which are accepted on the authority of God, but to defend, explain, and develop the doctrines revealed. The paramount importance and influence of Aquinas may be explained by considering him as the Christian Aristotle.[4]

Influence of Grotius.

Pound sums up the part played by Grotius in the development of Natural Law in these words:

> "But whereas in Suarez the divine law-maker has established the eternal and universal principles, Grotius makes reason the measure of all obligation and the basis of all limitations. In part this follows from the definite breaking with theology in which he carried out the ideas of the Protestant jurists of the Reformation."[5]

Effects of the Reformation.

Pound summarizes the developments of Natural Law after the Reformation as follows:

> "The main purpose of the Protestant jurist-theologians

[4]XIV Catholic Encyclopedia 667, 671.
[5]Pound, *The End of Law as Developed in Juristic Thought*, 27 Harv. L. Rev. 605, 616-617 (1914).

> was to throw over the authority of the church and to set up the authority of the state. . . . The legal system was to rest on the authority of the divinely ordained state, not on an authoritative universal law. All this flowed naturally from the break with authority which substituted private interpretation by the individual, each for himself, for authoritative universal interpretation by the church. The exigencies of this demand for private interpretation led to a claim of independence for the state, for the family and for the natural man. The logical result in jurisprudence was the opposition of the abstract man to society which developed in the juristic thinking of the eighteenth century. . . . It makes a significant stride when Hemmingsen attempts emancipation of jurisprudence from theology, telling us that divine revelation is not necessary to a knowledge of natural law, asserting that the firm and necessary ground of a legal system is to be found in the nature and end of law, and asserting that the ideas of right and wrong may be worked out by reason from the nature of man 'without the prophetic and apostolic writings.' "[6]

REASON ALONE AND THE LAW OF THE STATE.

The reason alone of the individual citizen of the State does not make the law of the State. Reason alone is inadequate for the individual citizen to discover and know all the Positive Law of the State. For example, a citizen's reason alone does not enable him to discover and know the whole of the Federal Income Tax law. Indeed, the Federal Government sees the necessity of educating the citizens in this respect and puts on an intensive program to instruct them as to the law. In addition, citizens employ their own experts to assist them in these matters.

REASON ALONE AND THE LAW OF THE CHURCH.

The individual member of the Church is not a law-maker unto himself. He does not rely on his reason alone to discover and know the Law of the Church. The *Codex Iuris Canonici* of the Catholic Church contains 2414 separate canons. Each of the many dioceses of the Church has legislative jurisdiction to make its own special laws in conformity with Positive Divine Law, Natural Divine Law, and the *Codex Iuris Canonici*. The member of the Catholic Church finds it necessary to rely on the Church to teach him what the Law of the Church is and to interpret that law for him.

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[6] *Ibid.* at 612-613.

UNION BANK AND TRUST CO. 'SAYS IT WITH PICTURES'

"365 days a year, displays in our windows at Eighth and Hill Streets are working at the job of making the public more 'will conscious.'" So says Don R. Cameron, vice president in charge of our Trust Department, shown here with Lewis B. Maier, trust representative, inspecting the latest in this continuing series of three-dimensional picture displays. "As you know," continues Cameron, "Eighth and Hill is a busy corner — some 750,000 passersby are exposed each month to our message: 'Have you made your will? See your attorney.'"

"Because of the interest evoked by our displays," says Cameron, "I'd like to suggest that you inspect them next time you are in the vicinity. My associates and I shall also be pleased and flattered if you can take time out to visit our Trust Department (on the 3rd Floor)—I can assure you that you'll be most welcome."

REASON ALONE AND GOD'S LAW.

Man as a creature of God is subject to the Law of God. He can not rely on his own unaided reason to discover and know the Law of God. It is a doctrine of the Catholic Church that the Lord Jesus Christ confided to the Church the deposit of faith in order that she, with the perpetual assistance of the Holy Ghost, may faithfully preserve and expound the revealed doctrine. Thus, supplementing tradition, revelation and the Sacred Scriptures, the teaching arm of the Church, with its Supreme Head, assisted by its theologians and canonists, makes known to its members the Law of God. (*Codex Iuris Canonici,* can. 1322.)

AMERICAN INTER-CHURCH-AND-STATE COMMON LAW.

Force of Constitutional Provisions.

In the United States, however, the Catholic Church has never been, and is not now, recognized as the authoritative universal interpreter of the Law of God and consequently of Natural Divine Law. In this country, where religious liberty is guaranteed by the Federal and State Constitutions, where there is no State Church, the number of sovereign churches capable of recognition as such under these constitutions is theoretically unlimited. The little village church, not affiliated with any other church, and with but a handful of members is considered in our secular law to be just as sovereign, relatively speaking, as the great international churches with millions of members, and the rights which it confers on its few members in spiritual matters may be recognized in our courts under Inter-Church-and-State Common Law as are the rights conferred on the members of the greater churches. Catholics concede that, under contemporaneous jurisprudence, American courts will hold that the Law of the State, in dealing with a legal situation involving Natural Law, as God's Law, will not recognize any one of the 250 or more churches now existent in this country as the ultimate authority for decisive pronouncement on the content and application of moral principles.

FALLACIES OF SECULAR CONCEPTS OF NATURAL LAW.

The first writer in the BAR BULLETIN, mentioned *supra,* as a leading exponent of the secularization of Natural Law, said:

> "... a workable system of law must be able to translate its precepts into action. Here natural law fails utterly, and because its judgments are unpredictable, would fail even though supported by the power to enforce its commands. For its judgments would be subjective, reflecting

> the moral ideas of the judge, his personal views on economic and legal matters (see Salmond, JURISPRUDENCE, 10th ed., . . . p. 30; Pound, THE SPIRIT OF THE COMMON LAW, p. 95). . . .
>
> "In these papers, I have objected to considering so-called natural law as though it were law. Naturally, no objection is made to the introduction of ethical concepts into the law. . . ."[7]

This writer *expressly* elected to ignore the Law of the Church and the Law of God in his treatment of Natural Law. Indeed, commenting on the fact that the main emphasis of St. Thomas "is theological," he states:

> "Lacking the qualifications to discuss this aspect of natural law, I shall limit these comments to those respects in which it affects human relations."[8]

He then proceeds to talk about an eighteenth-century system of Natural Law, a pagan system, with theology wholly removed therefrom. This was not God's Law, nor Natural Law as developed by Thomas Aquinas.

The second writer in the BAR BULLETIN,[9] differing sharply with the first writer's conclusions as to the influence of Natural Law as the "higher law" of American Common Law, apparently advances the following four propositions:

> (1) There are natural rights demonstrable by reason. The intellect discovers these natural rights—by analyzing man himself. These natural rights are inalienable, eternal and absolute.
>
> (2) Natural Law is more than a philosophy. It is a system of law, with a body of rules, ascertainable by reason, which perfectly secures all of these natural rights.
>
> (3) The State exists only to secure men in these natural rights.
>
> (4) Positive law is the means by which the State performs this function, and is obligatory only so far as it conforms to Natural Law, the product of men's minds. Natural Law, primarily securing natural rights, is *higher law* than all man-made law, superior even to the Federal Constitution.

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[7] Nossaman, *supra*, note 1, 24 L. A. BAR BULLETIN 65, 78 (1948).
[8] Nossaman, *supra*, note 1, 24 L. A. BAR BULLETIN 33, 56-58 (1948).
[9] Ford, *supra*, note 1.

The appeal is to individual reason. Hence every individual is the judge of this conformity.

If the above is a complete and fair summary of the second writer's position on Natural Law, it is believed that Dean Pound would classify it as but a variant of the eighteenth-century systems of Natural Law of the German jurist-theologians and would conclude:

> "Pushed to its logical limits, this leads straight to anarchy, and, indeed, the philosophical anarchist still proceeds upon this line."[10]

This second writer seems to be a follower of Hemmingsen, who, in the eighteenth century attempted emancipation of jurisprudence from theology. Unlike the first writer, the second did not *expressly* rule out any consideration of theology in his treatment of Natural Law. But *impliedly* he did the same thing. He did not mention the name of God a single time in his article. Like the first writer he was not talking of the Law of God, the Law of the Church, or of Natural Law as developed by Thomas Aquinas. On the other hand, the second writer may claim to be a true disciple of that system of Natural Law which was developed by Thomas Aquinas. However, it is submitted that he, like many other writers, has followed the ghostly will o' the wisp of a now dead eighteenth-century system of Natural Law.

The third writer, in his article in the BAR BULLETIN,[11] says:

> "In the seventeenth and eighteenth centuries, natural law ideas received immense prestige from the work of . . . Grotius. . . . His great contribution was the freeing of law from theology (God) (*sic*), where it had remained during the middle ages. . . .
>
> "The eighteenth century conceived of natural rights, inherent, eternal, universal, and demonstrable by reason; natural law, as a body of rules, ascertainable by reason, perfected to secure these rights; and the state as an instrument to secure these rights, which it does through positive law conforming to natural law. . . . Since the

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[10]Pound, *supra*, note 5 at 624.

Cf. "The communist vision is the vision of Man without God. It is the vision of man's mind displacing God as the creative intelligence of the world. It is the vision of man's liberated mind, by the sole force of its rational intelligence, redirecting man's destiny and reorganizing man's life and the world." (Quotation from article, I WAS THE WITNESS, by Whittaker Chambers, in The Saturday Evening Post, Feb. 9, 1952, page 60, 2nd col., 2nd par.)

[11]Gardner, *supra*, note 1.

> appeal is to individual reason, every individual is the judge as to whether the positive law conforms to the natural law. To avoid anarchy as a logical conclusion, a sort of standard conscience is assumed. Hence, the conception of an abstract ideal individual, in an abstract ideal universe, governed by abstract ideal principles of universal and eternal validity. . . ."[12]

The third writer in the BAR BULLETIN, though not explicitly championing any particular system of Natural Law, stressed the great importance of one of the eighteenth-century systems of Natural Law espoused by the German Protestant jurist-theologians. Of this particular system, Dean Pound has written:

> ". . . the eighteenth-century writers who taught that every man's conscience was the measure of the obligatory force of legal rules assumed a sort of standard conscience, a standard man's or conscientious man's conscience analogous to the prudence of the reasonable man in our law of torts. They assumed that if John Doe or Richard Roe asserted *his* conscience did not sustain the rules which the philosophical jurist deduced from the nature of a moral being, he either did not know the dictates of his own conscience or he was misrepresenting them in order to evade the binding force of the rule. It was only in this way that the social interest in general security could be protected effectively under the reign of the individualist natural law. But this meant in practice that the philosophical jurist made his personal ethical views the test of the validity of legal rules and that the lawyer took an ideal form of the settled legal principles in which he had been trained to be fundamental and eternal. . . .
>
> ". . . If in fact the individual conscience was made the sole test, the theory could be practically tolerable only at a time when absolute theories of morals prevailed. All men, or most men, must agree in their moral standards, or agree in looking to some ultimate authority for decisive pronouncement on the content and application of moral principles, or else legal doctrine would be wholly at large. Hence the actual situation was that the lawyer took the principles of the received legal tradition as an authoritative guide while the jurist and philosopher sought to impose their several personal views as final statements of fundamental principles. . . . When absolute theories began to be discarded and ultimate authorities were no longer recognized; when, moreover, classes with

[12]Gardner, *supra*, note 1 at 152-153.

> divergent interests came to hold diverse views upon fundamental points, natural law, in the eighteenth century sense became impossible. . . ."[13]

Twenty years later Dean Pound wrote:

> "In the United States we began to import the eighteenth-century natural law and to put it to work at a time when it was already moribund. . . ."[14]

It is submitted that the eighteenth-century systems of Natural Law, as systems of *law,* are now dead and that the *corpus delicti* should not be disinterred.[15]

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[13]Pound, *supra,* note 5 at 624 and 627.

[14]Pound, *A Comparison of Ideals of Law,* 47 Harv. L. Rev. 1, 13 (1933).

[15]"The philosophy of law has been predominantly and, at times, almost exclusively, an Italian subject. The philosophic ideas at the basis of classical Roman law were, to be sure, Hellenic in origin. But Italian administrative genius was certainly one of the conditions of that continuous development which made Roman law fit to be the law of the world. This administrative genius, as a fine perception of the way to reconcile conflicting interests into a harmonious whole, is perhaps best seen in the greatest of all Italian philosophers, St. Thomas of Aquinas, whose formulation of the nature of law is still authoritative for the hundreds of millions who adhere to the Catholic Church. . . .

"Besides positivism and the various forms of idealism, we must reckon with neo-scholasticism and more specifically with neo-Thomism. Since the famous Bull, *Aeterni Patris* of Leo XIII, the philosophy of St. Thomas has been officially adopted as a basis of instruction in Church schools, seminaries, etc. This has been a powerful stimulus to the awakening of general interest in the Thomist-Aristotelian tradition. . . .

"But even in the universities outside of the Church, men are paying considerable attention to the Thomist conception of law. . . ."

Cohen, *Italian Philosophy of Law,* 59 Harv. L. Rev. 577, 586 (1946).

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SILVER MEMORIES

(Continued from page 408)

In New York, Secretary of the Navy **Curtis Wilbur,** pinned the Distinguished Flying Cross of the Navy on Commander **Richard E. Byrd** and Lieutenant **George O. Noville** at a dinner for six recent transatlantic flyers: **Byrd, Neville Clarence Chamberlain, Charles Levine, Bert Acosta** and **Bernt Balchen.** Afterwards the flyers went to the Polo Grounds where they joined in the celebration of John McGraw's 25th anniversary as Manager of the Giants.

* * *

Henry Ford, at Detroit, took his first aeroplane ride up to 2,000 feet, and at the same time was the first passenger in Col. Charles A. Lindbergh's Spirit of St. Louis, an extra seat having been installed in the monoplane for the occasion.

* * *

The outstanding visitor to the American Bar Association convention to be held at the end of August at Buffalo is The Right Honorable Hewart, Baron of Bury, Lord Chief Justice of England. Hon. **Charles S. Whitman** and Governor **Alfred E. Smith** of New York will also speak. Delegates from Los Angeles to the conference of bar association delegates are **Kemper Campbell, Jefferson P. Chandler, Thomas C. Ridgway, Gurney E. Newlin, Roy V. Reppy** and **Robert Brennan.**

* * *

William J. Carr of Los Angeles has been appointed by Governor Young to the vacancy on the State Railroad Commission resulting from the recent death of **Harley W. Brundige** of Los Angeles. Carr was formerly State Senator, is a lawyer and has been an active figure in public life in California. He was recently Governor Young's Southern California campaign manager. Governor Young also reappointed **R. E. Mittelstedt** as Adjutant General of the California National Guard.

* * *

Frederic H. Vercoe, who has been connected with the office of Public Defender for 14 years as deputy and chief deputy, has been appointed Public Defender by the Board of Supervisors. Vercoe succeeds **William T. Aggeler** who was recently appointed to the Superior Bench.

A merger of the First National Bank of Los Angeles and the Pacific Southwest Trust and Savings Bank is being submitted to the stockholders for approval. Under the proposed plan the two institutions will be merged into a single bank operating under the charter of the First National Bank, according to a statement issued by **Henry M. Robinson**, president of the First National.

* * *

J. A. Tucker, a deputy in the office of County Counsel **Everett W. Mattoon** for the last four and a half years, has resigned to enter private law practice with **Lawler & Degnan**. Tucker specialized in tax litigation while with the County Counsel's office, and at the time of his resignation was in charge of all tax litigation of the County passing through the office.

* * *

At a meeting of the Los Angeles Bar Association, the official quartet consisting of **Everett Mattoon, Fred Williamson, William Clary** and **Phil Richards** sang several songs.

* * *

There are now 45 bar associations in California with a total membership of 4,833.

TAXATION REMINDER

(Continued from page 400)

meaning, but the term has received judicial construction in connection with other sections of the revenue laws.

(3) In the case of a donated interest, the income of the partnership distributable to the donee in accordance with the partnership agreement will be taxed to the donee, *except* to the extent that the donor has not been reasonably compensated for the services which he rendered to the partnership.

(4) The share of the profits to be distributed to the donee must not be proportionately greater than the share of profits distributable to the donor, taking into account their relative capital interests in the partnership.

While Congress has done a great deal to eliminate the tax risks incident to a family partnership, constructive thinking is still required to insure compliance with the above requirements.

With an intelligent approach to the matter, the family partnership can now, more safely than ever before, be a vehicle for substantial tax savings.

EXCESS PROFITS TAX RELIEF

(Continued from page 405)

and change in accounting method[20] may offer some trouble. Assuming the item under consideration fits into Section 456 (a)(2)(B), for example, exploration, discovery, etc., the question immediately presenting itself is whether the entire amount of this item is attributable to exploration, discovery, or processing or whether it is a part of income attributable to perhaps other factors such as selling or manufacturing. Under the prior code section the courts apparently adopted a policy of arbitrarily assigning portions of income to the various factors that might be involved.[21] Though this question again presented itself in later cases the court gave no indication it would alter its policy.[22] Hence, it is incumbent upon the attorney to set out in detail the facts upon which he bases his conclusions and show that he has made a sincere attempt to follow the regulations.

NET ABNORMAL INCOME

Once the attorney has succeeded in establishing the amount of gross abnormal income, he must be prepared to prove the amount

[20] I. R. C., Sec. 456(a)(2) (B through D).
[21] Ramsey Accessories Mfg. Corp., 10 T. C. 482 (1948), and Keystone Brass Works, 12 T. C. 618 (1949).
[22] Toledo Engineering Co., 14 T. C. 765 (1950); Sommerfield Machine Co., 15 T. C. 468 (1950), and Bailey Co., 15 T. C. 468 (1950).

of net abnormal income. As we have seen net abnormal income is the excess of gross abnormal income over 115% of the average of income of the same class for the preceding four years, or a part thereof that the taxpayer was in business, less a proportion of costs and deductions relating to the abnormal income. The 115% test is not applied to each item included in the class but rather to the total for the class.[23] Similarly, the costs and deductions are considered as a class.[24] To each item in the class is then allocated an amount of the total net abnormal income of the class that is in the same ratio as each item of the class bears to the total of the items in class.[25]

A simple set of facts will serve to illustrate this formula.

Assume the following facts:

Income from judgments.			
1948	$ 5,000.00	Judgment against A in 1952	$20,000.00
1949	2,000.00	Judgment against B in 1952	15,000.00
1950	1,000.00	Cost of judgment against A	5,000.00
1951	4,000.00	Cost of judgment against B	3,000.00
1952	35,000.00		
Income from judgments in prior years.			
1948	$ 5,000.00		
1949	2,000.00		
1950	1,000.00		
1951	4,000.00		
	$12,000.00	Total for four years.	
	$ 3,000.00	Average	
	$ 3,450.00	115% thereof	

Total abnormal income for 1952	$35,000.00	
Less (115%) shown above	3,450.00	
	$31,550.00	
Less an amount bearing the same ratio to total costs ($8,000.00) as $31,550.00 bears to $35,000.00	7,200.00	
	$24,350.00	
(1) Gross income from judgment against A	$20,000.00	
(2) Less cost applicable to this item	5,000.00	
(3)		$15,000.00
(4) Gross income from judgment against B	15,000.00	
(5) Less costs applicable to this item	3,000.00	
(6)		$12,000.00
(7) Total (3) plus (6)		$27,000.00
Portion of net income allocable to judgment against A (15,000/27,000 of $24,350.00)		$13,527.78
Portion of net income allocable to judgment against B (12,000/27,000 of $24,350.00)		$10,822.22

[23] Rochester Button Co., 7 T. C. 529 (1946).
[24] *Montgomery's Federal Taxes, Corporations and Partnerships*, 1951-2, Chapter 8.
[25] *Ibid.*

It must be borne in mind by the attorney that only those costs or deductions which relate to costs and deductions allowable in the determination of normal tax net income should be considered.

INCOME ATTRIBUTABLE TO OTHER YEARS

It is apparent from the code[26] that no relief is possible unless it is shown that net abnormal income received in the taxable year is attributable either to past or future years. What amount is attributable to other years is not defined in the code but is left to determination by Treasury regulations. The regulations prescribe the following rules for allocation:[27] (1) determine the events in which the item of abnormal income had its origin; (2) the amounts so determined must be reasonable; (3) no items of abnormal income are allocable which result from (a) increase in demand, (b) decreased competition, (c) high prices, (d) low operating costs, and (e) new investments.

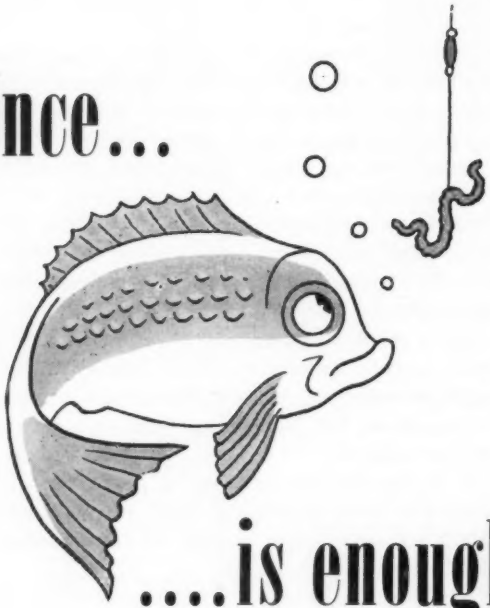
Under the former code section (Sec. 721), as under the present law, the burden of proof to establish what income is attributable to other years has been placed squarely on the shoulders of the taxpayer by the courts.[28]

Categories of abnormal income which have received special attention from the courts under Section 721 are those items which were the result of an investment in assets employed in or contributing to the production of income[29] and those which were a result of an increase in demand. In both, the courts have upheld the validity of the regulations and have refused to allow items in these categories to be allocated as abnormal income attributable to other years.[30]

In the *Premier Products*[31] case the taxpayer collected proceeds from a life insurance policy on the life of an officer in 1940. The policy had not been taken out with the insurance company by the taxpayer but had been purchased from another corporation. Since the excess of the proceeds over the cost was taxable income, the taxpayer claimed relief under Section 721. Contention made by the taxpayer was that the gain should be attributed in part to the year in which the policy was purchased and a part to the subsequent years in which it had made premium payments. In denying relief, the court said that the method of allocation proposed by

[26] I. R. C., Sec. 456(b).
[27] Reg. 130, Sec. 40.456-3.
[28] Swaby Corp., 9 T. C. 887 (1947), and Bogle Co., Inc., 10 T. C. 1282 (1948).
[29] Reg. 112, Sec. 35.721-3.
[30] Premier Products Co., see footnote 5, and Slider, Inc., 5 T. C. 263 (1945).
[31] *Ibid.*

Once...



....is enough!

And once is enough to pay estate taxes! Through you, a Testamentary Trust can be set up for your client that may be used to avoid double taxation of the same estate. (Property taxed at the death of the first spouse, and taxed again at the death of the second spouse.)

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the taxpayer was based solely on an investment made by it in an insurance policy.

One authority[32] believes that where income is realized by the taxpayer in a taxable year from an investment made in a prior year, and such income arises solely from improved general economic conditions, it would be equitable to enforce the regulation to bar relief. On the other hand, he is of the opinion that where income is due to causes other than general economic conditions relief should be granted.

Before making his allocation, the attorney should acquire some knowledge of the internal accounting system of his client. Attributing net abnormal income in a manner at variance with the taxpayer's established accounting practice has been fatal to its demand for relief.[33] Thus, where 1941 real estate gains were reported on the installment basis in later years under Section 44(b) they were held not to be attributable to 1941 under Section 721.[34] Similarly, where one year's expense has given rise to some income in that year and some income in the next, the courts have refused to allow the taxpayer to alter its established accounting practice by attributing any part of the income in the later year to the prior year's expense.[35] A sales promotion program is a good example of this situation. Great sums are expended during the current year to make the taxpayer's product known to the public but it is not until some time later in the current year and in the subsequent year that the income from sales directly resulting from the campaign is realized.

Perhaps the more elusive category not allowed by the regulations and the courts is the one which deals with increased demand. Into this group can be lumped high prices, low operating costs, due to increased demand or decreased competition.[36] Some authorities believe that it is possible that under the narrower scope of the new law, no cases will arise in which recognition of increased demand will be required.[37] Reliance for this conclusion is placed on *Southwestern Oil and Gas Co.* case[38] where the Tax Court found that there had always been a ready demand for every barrel of oil produced in that field and thus no elimination was

[32] *Montgomery's Federal Taxes*, see footnote 24.
[33] Bogle Co., Inc., see footnote 28, and Yuba Gardens, Inc., 17 T. C. 39 (1951).
[34] *Ibid.*
[35] Geyer, Cornell & Newell, Inc., see footnote 11, and Producer's Crop Improvement Ass'n, 7 T. C. 562 (1946).
[36] Reg. 130, Sec. 40.456-3.
[37] *Montgomery's Federal Taxes*, see footnote 24.
[38] 6 T. C. 1124 (1946).

made for increased demand. Yet, courts are frank to admit that, where the factor of increased demand was present, in the last analysis the question is a matter of opinion.[39] With such a situation existing it behooves the attorney to marshal all his evidence consonant with the regulations and make a full and complete disclosure of all pertinent facts.[40]

CONCLUSION

Section 456 can and does offer considerable relief to a corporate taxpayer whose attorney is cognizant of its provisions. Statistics show that under the prior law (Sec. 721) the taxpayer secured relief in almost 40% of the cases tried over a period of 7½ years.[41] The percentage would be much higher if those cases dealing with research and development of tangible property were ignored. A great many of the cases lost by the taxpayer involved this type of abnormal income to which the new law grants no relief. The court is guided, for the most part, by well defined principles. Thus, before advising a client as to his position excess profits tax-wise, stop and consider the possibility of relief Section 456 may afford him.

[39] Rochester Button Co., see footnote 23.
[40] *Case Law under Sec. 721*, see footnote 12.
[41] *Ibid.*

BROTHERS IN LAW

(Continued from page 412)

A recent decision of the Supreme Court of **Colorado** holding a 1913 law to be effective even though omitted from the last two compilations of Colorado statutes has created a lively market in that state for volumes of old statutes and session laws.

* * *

Inflation note . . . The annual dues of the **Illinois** Bar Association were set at $2.00 when it was organized in 1877 . . . they are now $15.00.

* * *

The one hundred lawyers and judges who play in the Bowling League of the **Chicago** Bar Association take the jargon of the profession along with them to their recreation. Their teams bear such familiar names as Lis Pendens, Mandamus, Res Gestae, Tort Feasors and Absque Hoc.

In 1893 the **Illinois** Bar Association first debated the proposal that the rule in Shelley's case be abolished. Now, almost 60 years later, the debate still rages.

* * *

Notices similar to the following have been appearing for some months in *Dicta*, publication of the **Colorado** Bar Association, without producing any result:

COUNTRY LAWYER NEEDED

Paonia and the entire north portion of Delta County is in need of a lawyer to take over an established law office. Anyone interested may contact Clair H. Hadley, Town Clerk of Paonia, Colorado, or phone FRemont 0113 or AComa 3771 in Denver.

B. Nonymous, little known brother of the prolific A. Nonymous, was so touched on reading of Paonia's plight that he dashed off the following touching lines:

Oh there's panic in Paonia,
Not a lawyer can be found
Within the village limits
Or the county half around.

Decedents die intestate
Who'd prefer the testate route
And claims are lapsing all about
That should be brought to suit.

The minors go unminded,
Endorsers unrecoursed,
Encumbrances are unforeclosed
And couples undivorced.

No smog corrupts Paonia's sky,
But o'er her like a pall
There broods this melancholy thought:
No lawyer—none at all.

What that the woods abound with game,
The mountain streams with trout—
When lawyers scattered on the map
They left Paonia out.

Attend again Paonia's plea:
"Oh Lawyer, Come, We'll love you.
Why tarry in the city then
Which holds so many of you?"

MRS. MARIAN G. GALLAGHER MARCH 1951
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SEATTLE 5, WASHINGTON